

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 07 July 2004

BALCA Case No.: 2003-INA-155
ETA Case No.: P2000-CA-09509577/ML

In the Matter of:

HOLLYWOOD AT THE EL REY, INC.,
Employer,

on behalf of

JOSE JUAN VADILLO,
Alien.

Appearances: James L. Rosenberg, Esquire
Los Angeles, California
For Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Restoration and Maintenance Engineer.¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

¹ Permanent alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On June 26, 2000, Hollywood at the El Rey, Inc. ("the Employer") filed an application for labor certification to enable Jose Juan Vadillo ("the Alien") to fill the position of "Restoration and Maintenance Engineer." (AF 16). The Occupational Title for the position was listed as "Carpenter Maintenance." The job duties included restoration and reconstruction of historical 1936 art deco woodwork, plasterwork and tilework, as well as ongoing maintenance of same. (AF 16).

The CO issued his Notice of Findings ("NOF") on November 6, 2002, proposing to deny certification because it appeared that the Alien was hired without two years of experience in the job description, and therefore the Employer was in violation of 20 C.F.R. § 656.21(b)(5). (AF 13). The Employer was directed to (1) amend the ETA 750B, signed by the Alien, showing the lack of experience, training and/or education; (2) amend the ETA 750A to delete the requirement the Alien did not possess at the time of hire; or (3) document how it was not feasible to hire workers with less training or experience than that required by its job offer.

The Employer submitted rebuttal by letter dated November 27, 2002. (AF 5). Therein, the Employer indicated that the Alien did have the two years of experience as indicated by two experience verification letters attached to the rebuttal. The Employer stated that it was willing to retest the labor market if necessary, and submitted a draft advertisement. That advertisement listed the same requirements as previously stated. With regard to the experience verification letters, one was from The Hollywood Spa, verifying that the Alien worked for it as a building and restoration carpenter from 1992 to 1994, his duties having included repairs of "historic architectural details of the building and their ongoing maintenance." (AF 7). Also included was a letter from Jugos Del Valle, indicating that the Alien worked for it from 1982 through 1988 as a plumber, electrician, welder and fountainer. (AF 8-9).

The CO issued a Final Determination ("FD") on January 10, 2003, denying certification. (AF 3). The CO determined that the letters provided by the Employer failed to establish that prior to his employment with it, the Alien had experience with "historical 1936 art deco woodwork, plasterwork and talework[sic]" as the ETA 750A required. Accordingly, the Employer had failed to state its true minimum requirements and was non-compliant.

Employer filed a Request for Review on February 10, 2003 and the matter was docketed in this Office on April 10, 2003. (AF 1). Along with its Request for Review, the Employer submitted an additional letter from The Hollywood Spa. On May 28, 2003, the Employer submitted a "Statement of Position of Employer," as well as photographs of work performed by the Alien. The Statement of Position merely reiterated that the Alien had been employed by The Hollywood Spa for two years as a Restoration Manager.

DISCUSSION

As a preliminary matter, we will not consider the evidence submitted by the Employer in connection with the request for review. Our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27(c); *see also* 20 C.F.R. § 656.26(b)(4). Thus, evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Furthermore, where an argument made after the FD is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989).

Of the three alternative means of rebuttal provided, the Employer chose to argue that the Alien did, in fact, have the minimum required experience prior to hire. The ETA 750B indicated that the Alien worked with the Employer from 1994 to present in the position at issue, and that from 1989 to 1992, he worked for Midtown Hilton, performing such jobs as plumbing, electric wiring, patching plaster on walls and inspecting and

repairing rooms. (AF 43). This clearly does not establish that the Alien had the experience prior to hire. The ETA 750B did not mention the Alien's position with The Hollywood Spa; the ETA 750B indicated a gap in the Alien's employment from 1992 to 1994.

As the CO determined, the Employer's rebuttal also failed to establish that the Alien had the specific experience required for this position prior to hire. The ETA 750A and the job advertisement required experience in "restoration and reconstruction of historical 1936 art deco work." (AF 16). Employer's rebuttal consisted of a short letter stating that the Alien was employed as a "building and restoration carpenter." (AF 7). The Employer did not follow the CO's instructions to amend the ETA 750B to reflect this experience. The letter did not indicate the duties of the job, as required on the ETA 750B. It only stated that the Alien had held the position of restoration carpenter. This alone fails to satisfy the Employer's burden to demonstrate that the Alien possessed the necessary qualifications when hired by the Employer.²

A job opportunity's requirements may be found not to be the actual minimum requirements where the Alien did not possess the necessary experience prior to being hired by the employer. *Super Seal Manufacturing Co.*, 1988-INA-417 (Apr. 12, 1989)(*en banc*). An employer violates 20 C.F.R. § 656.21(b)(5) if it hires an alien with lower qualifications than it is now requiring and has not documented that it is now not feasible to hire a U.S. worker without that training or experience. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Such is the case here and labor certification was properly denied.

² It should be noted that even if the evidence submitted with the Employer's request for review (specifically the letter from The Hollywood Spa) was considered, it would still fail to satisfy the Employer's burden. The letter does not indicate the duties of the job, only that the Alien served as "Restoration Manager" for The Hollywood Spa. Coincidentally, the original letter from The Hollywood Spa, submitted with the Employer's rebuttal, described the Alien's position as "restoration carpenter," not manager. The second letter praised the Alien's skills and abilities, but this alone cannot satisfy the Employer's burden to demonstrate the Alien's two years of experience in the position offered, a requirement for all other applicants for the position.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.